HONORABLE BARBARA LINDE
Hearing Date: November 6, 2018

SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

OMAR ABDUL ALIM, an individual; MICHAEL THYNG, an individual; THE SECOND AMENDMENT FOUNDATION, INC., a Washington non-profit corporation; and NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; a New York non-profit association; Plaintiffs, v. CITY OF SEATTLE, a municipality; JENNY DURKAN, Mayor of the City of Seattle, in her official capacity; SEATTLE POLICE DEPARTMENT, a department of the City of Seattle; and CARMEN BEST, Chief of Police, in her official capacity, Defendants.	No. 18-2-18114-3 SEA **PLAINTIFFS' MOTION FOR RECONSIDERATION**

I. RELIEF REQUESTED

Plaintiffs Omar Abdul Alim, Michael Thyng, The Second Amendment Foundation, and the National Rifle Association of America, Inc. (collectively, "Plaintiffs") hereby move under CR 59 and LCR 59 for reconsideration of the Order Granting Defendants' Motion to Dismiss dated

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October 19, 2018, and the Court's denial of leave to amend.

Rejection of leave to amend an un-amended complaint is a harsh ruling that runs counter to Rule 15(a)'s directive to "freely" permit amendment when possible. The Court based its denial of leave to amend on futility, but did not give Plaintiffs an opportunity to allege additional facts to respond to the Court's stated justiciability concerns. This ruling affects Plaintiffs' substantial rights, misapplies the relevant legal standards, and prematurely terminates this litigation. Plaintiffs should be permitted to attempt to allege facts directed towards control of stored firearms, and Defendants cannot and will not suffer any prejudice. In fact, as demonstrated by the proposed First Amended Complaint ("FAC"), Plaintiffs are able to allege facts that specifically and conclusively prove that the second sentence of SMC 10.79.020 does not apply and that Plaintiffs have alleged a justiciable dispute. Plaintiffs respectfully request that the Court consider the proposed pleading, and allow Plaintiffs permission to file it.

The proposed FAC is consistent with the current pleading, and demonstrates that the Complaint alleges facts that permit the inference that Plaintiffs' current storage practices include storing firearms unlocked and outside the control of authorized users. Plaintiffs respectfully request that the Court reconsider the ruling dismissing the original pleading, and allow this case to proceed to discovery and a prompt ruling on the pure legal issue of preemption.

II. STATEMENT OF FACTS

On July 9, 2018, the Seattle City Council passed Council Bill 119266, titled "An Ordinance relating to the safe storage of and access to firearms" (the "Ordinance"). Compl. ¶ 12. On July 18, 2018, Mayor Durkan approved and signed the Ordinance, making the Ordinance effective and in force on August 17, 2018. The Ordinance states that the substantive provisions

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will be imposed in February 2019, as administrated by the Seattle Police Department. The Ordinance require residents of Seattle to "store or keep any firearm . . . secured in a locked container, properly engaged so as to render such weapon inaccessible or unusable to any person other than the owner or other lawfully authorized user." SMC 10.79.020. The requirement to secure the firearm in a locked container does not apply if the firearm is carried by or under the control of an authorized user. *Id.* The ordinance does not define control. The minimum penalty for an infraction is $500, with the maximum fine up to $10,000.

Plaintiffs contend that this Ordinance is unmistakably preempted by RCW 9.41.290. The state of Washington has the exclusive right to regulate the possession of firearms, and cities may not enact local laws or regulations related to the possession of firearms. The City of Seattle does not have the authority to regulate Plaintiffs' possession and storage of firearms or to compel Plaintiffs to purchase gun safes as part of that regulation. Plaintiffs desire a judicial determination of the legality of the Ordinance before it goes into effect.

Plaintiffs' Complaint alleges that Mr. Alim and Mr. Thyng own firearms and keep them unlocked in their homes; that they want to keep storing firearms unlocked and ready to use for purposes of self-defense; that their current practices would violate the Ordinance; that they fear enforcement of the Ordinance; and (in Mr. Alim's case) that he would need to purchase a gun safe if he decides to comply with the Ordinance. Compl. ¶¶ 1–2. The organizational plaintiffs represent members located in the City of Seattle, including Mr. Alim and Mr. Thyng, who will be forced to alter the manner in which they possess and store firearms to their detriment and encroaching on the right to self-defense in their homes. These interests are at the core of the SAF and NRA's respective organizational purpose. *Id.* ¶¶ 3–4. Plaintiffs have prayed for a declaration that the Ordinance is contrary to law, null, and void. Trial in this matter is set for June 2019.

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Defendants filed a Motion to Dismiss on August 30, 2018. Defendants argued that Plaintiffs lacked standing and that their claims were not ripe because Plaintiffs did not allege an intent to violate the Ordinance. The Court heard argument on October 19, and ruled that Plaintiffs had not alleged a justiciable claim under the Uniform Declaratory Judgment Act ("UDJA"). Declaration of Eric Lindberg ("Lindberg Decl.") ¶ 2, Ex. 1 at 28 (oral argument transcript). The Court ruled that "There's no allegation of an intent or a desire to allow the firearm to be anything other than under the control of the owner or other lawfully-authorized user." *Id.* at 28–29. The Court specifically relied upon the second sentence of SMC 10.79.020, remarking that "this would be a different ruling today but for that second sentence. And that's very critical to the Court's ruling here that there is not a justiciable controversy." *Id.* at 29. The Court denied leave to amend, ruling that the Court could not "envision a pleading that would cure this, and so it's with prejudice." *Id.* at 30–31.

III. STATEMENT OF ISSUES

1. Whether the Court should reconsider granting Defendants' Motion to Dismiss?

2. Whether the Court should reconsider denial of leave to amend because it is not impossible for Plaintiffs to allege facts that state a justiciable claim and because Plaintiffs' proposed First Amended Complaint is not futile?

3. Whether the Court should grant Plaintiffs leave to file the proposed First Amended Complaint?

IV. EVIDENCE RELIED UPON

This Motion relies upon the Declaration of Eric Lindberg, together with the exhibits

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attached thereto and the materials on file in this action.

V. AUTHORITY

A. Legal Standard.

The Court may vacate and reconsider any decision or order upon a motion by a party whose substantial rights have been materially affected. CR 59(a). The moving party must "identify the specific reasons in fact and law as to each ground on which the motion is based." CR 59(b). Granting a motion for reconsideration pursuant to CR 59 is appropriate when the party identifies an error in law that was not waived by the party. CR 59(a)(8).

Generally, the decision to review or deny "the motion of the party aggrieved" is within the sound discretion of the trial court. *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812, 440 P.2d 834 (1968) (explaining that on review, the court "will not intervene unless it can be shown that the trial court manifestly abused its discretion."). But where the issue concerns an error of law, "no element of discretion is involved," and the inquiry focuses on "whether the grounds relied on by the trial court are supported by the applicable legal principles and decisions." *Id.* at 812-13; *Martini v. Post*, 178 Wn. App. 153, 161, 313 P.3d 473 (2013) ("Legal issues are reviewed de novo.").

B. The Court Should Reconsider Granting Defendants' Motion to Dismiss

Plaintiffs respectfully request that the Court reconsider its ruling that the Complaint does not state a justiciable declaratory judgment claim. The Court's ruling turned on the interpretation that the allegations in the Complaint did not allege a desire to store firearms out of the control of authorized users. Lindberg Decl. ¶ 2, Ex. 1 at 28–29. But the allegations in the Complaint are broader than the Court's interpretation, and as-plead the factual allegations include a desire to store firearms unlocked and outside the control of authorized users. Thus, the second sentence of SMC 10.79.020 is not enough to make this dispute hypothetical or uncertain.

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The Washington Supreme Court has repeatedly held that a motion to dismiss must be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Haberman v. WPPSS*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987) (citation omitted); *Corrigal v. Ball & Dodd Funeral Home, Inc*., 89 Wn.2d 959, 961, 577 P.2d 580, 582 (1978) (citation omitted). Factual allegations of the complaint, along with any reasonable inferences, must be accepted as true. *See id.*; *Wright v. Jeckle*, 104 Wn. App. 478, 481, 16 P.3d 1268, 1269 (2001).

Here, Mr. Alim alleges that he "currently owns a firearm that he keeps unlocked in his home for self-defense and defense of his family" and that he "has a strong desire to continue having his firearm in an unlocked and usable state in his home." Compl. ¶ 1. Mr. Alim fears enforcement, and does not currently own a gun safe. *Id.* Mr. Thyng also wants to continue to have a firearm in an unlocked and usable state in his home. *Id.* ¶ 2.

These allegations are consistent with Plaintiffs' contention that their current storage practices violate the Ordinance. There are sets of reasonable facts under these allegations where Plaintiffs store firearms unlocked and outside of their control. *Haberman*, 109 Wn.2d at 120. Mr. Alim does not own a gun safe or any other equipment to lock up his firearms. Any time that he and his spouse are outside the home and he leaves any firearms behind, those firearms are unlocked and outside of the possession or control of an authorized user. And when either Mr. Thyng or Mr. Alim are in the home and not carrying a firearm, there will inevitably be periods of time when such a firearm is unlocked and not under their control.[1]

[1] The Ordinance does not define control, and Plaintiffs are unaware of any Washington decision clarifying what control means in this context. Surely, Defendants cannot contend that the Ordinance must not be subject to judicial review until they (eventually) define their own vague term. In any event, even under the authority cited by Defendants, an individual is not in control of a firearm when it is in a closet on a different floor. *Com. v. Patterson*, 79 Mass. App. Ct. 316, 319-20, 946 N.E.2d 130 (2011) (examining location, proximity, and "ability to immediately reach" to determine that a firearm stored in an upstairs closet when the defendant downstairs was outside of the defendant's control).

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Additionally, reasonable inferences derived from the allegations in the complaint support the conclusion that Plaintiffs allege "an actual, present[,] and existing dispute, or the mature seeds of one." *Diversified Indus. Devel. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137, 139 (1973). Both Mr. Thyng and Mr. Alim allege that they fear enforcement of the Ordinance. The reasonable inference from this fear is that Plaintiffs, who are aware of their actual storage practices and of the requirements of the Ordinance, know that their current and intended future conduct would be subject to enforcement.

In any event, Plaintiffs are not required to plead facts that anticipate Defendants' affirmative reliance on the second sentence of SMC 10.79.020 to defend the Ordinance, or to establish with certainty and particularity that their current conduct falls into that narrow exception that Defendants discussed in parts of two paragraphs. Rule 8 does not require plaintiffs "to plead matters in anticipation of their being raised affirmatively by the defendant." *Clover Park Sch. Dist. No. 400 v. Consol. Dairy Products Co.*, 15 Wn. App. 429, 436, 550 P.2d 47, 51 (1976).

For these reasons, a motion to dismiss should be granted only "sparingly and with care." *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147, 150 (1995) (quoting *Haberman*, 109 Wn.2d at 120). In *Bravo*, the trial court granted a motion to dismiss based on the argument that the plaintiffs had not specifically alleged "union involvement" as part of their allegations. The Washington Supreme Court reversed, holding that union involvement was not a necessary element that plaintiffs must affirmatively plead. Even if it was, the Court held, the plaintiffs' allegations were "consistent" with union involvement, which was enough. "The employees' allegations were consistent with union involvement, and the Court of Appeals would have been required to deem as true any assertions consistent with the complaint, even if made for the first

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time on appeal." *Id.* Strikingly, the Washington Supreme Court permitted "hypothetical facts" asserted by the plaintiff, including facts not in the record and alleged for the first time on appeal, to be used by the court to establish whether or not the complaint states a claim. *Id.*

In this case, Plaintiffs' proposed First Amended Complaint demonstrates, with particularity, facts consistent with the Complaint. These allegations demonstrate Mr. Alim's current practice of storing firearms---unlocked, often outside the control of authorized users, and in proximity to minors. Lindberg Decl. ¶ 3, Ex. 2 ¶¶ 18–20. Those current practices are unquestionably not compliant with the Ordinance, and Mr. Alim desires to continue those practices in the future. The Court may take note of these facts, grant reconsideration, and deny Defendants' motion to dismiss. *See Bravo*, 125 Wn.2d at 750.

Last, Plaintiffs' Complaint satisfies the other elements of the justiciability test. The justiciability test is primarily concerned with ensuring that interested parties litigate the issue, and that factual issues do not prevent a final legal ruling. There is no argument that the parties do not have opposing interests or will not vigorously litigate this case. And the legal issue on the merits in this case does not depend upon how the City of Seattle defines control, or other factual issues that could complicate the Court's administration of this case. Instead, the legal issue on the merits is whether or not the City of Seattle has the authority to enact the Ordinance in view of the broad preemption of firearms regulation by the State. *See Chan v. City of Seattle*, 164 Wn. App. 549, 265 P.3d 169 (2011).

C. The Court Should Reconsider Denying Plaintiffs Leave to Amend

1. Amending Pleadings After Motion to Dismiss

The Court may set aside the ruling denying leave to amend under one of the grounds set

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forth in Rule 59. *See Rose ex rel. Estate of Rose v. Fritz*, 104 Wn. App. 116, 121, 15 P.3d 1062, 1065 (2001). This procedure is the same in State and Federal courts. *See Katyle v. Penn Nat. Gaming, Inc.*, 637 F.3d 462, 470–71 (4th Cir. 2011) (district court may vacate judgment under Rule 59 and then grant motion to amend the complaint). When the ground asserted under Rule 59 is an error of law, the Court considers the legal test employed when considering whether to grant leave to amend. *See Detrick*, 73 Wn.2d 812-13 (focusing inquiry on the underlying legal principles when considering motion to reconsider based on legal error); *see also Katyle*, 637 F.3d at 470–71 ("In other words, a court should evaluate a postjudgment motion to amend the complaint under the same legal standard as a similar motion filed before judgment was entered—for prejudice, bad faith, or futility." (internal quotation marks omitted)).

Amendments to pleadings are governed by Rule 15(a), which provides, in pertinent part, that "a party may amend his pleading only by leave of court . . . and leave shall be freely given when justice so requires." The purpose of pleadings are to "facilitate a proper decision on the merits." *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 100 Wn.2d 343, 349, 670 P.2d 240, 243 (1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). And the purpose of Rule 15 is to "facilitate the amendment of pleadings except where prejudice to the opposing party would result." *Id.* (quoting *United States v. Hougham*, 364 U.S. 310, 316 (1960)).

If there is no prejudice to the opposing party, a plaintiff should be freely allowed to amend the complaint if it appears that the plaintiff will be able to state a claim. *See id.* For example, plaintiffs who ask the court for leave to amend at an early stage—as here, before the defense has even answered the complaint and discovery undertaken—should be allowed to do so unless the proposed amendment is certain to be futile. *See Culpepper v. Snohomish Cty. Dep't of Planning & Cmty. Dev., Cmty. Dev. Div.*, 59 Wn. App. 166, 176, 796 P.2d 1285, 1291 (1990) (allowing

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plaintiff to amend the complaint after dismissal). In the absence of prejudice or futility, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.* (quoting *Foman v. Davis*, 371 U.S. 178, 182–83 (1962)).

2. The Proposed FAC States a Justiciable Claim for the Individual Plaintiffs

Turning to the proposed FAC, the expanded allegations demonstrate that Mr. Alim's current storage practices do not comply with the Ordinance, even when taking into account the second sentence of SMC 10.79.020.

The Ordinance creates a civil infraction for storing firearms without securing the firearm in a locked container. As Mr. Alim stated originally, he owns and stores firearms, and he does not own a gun safe or other means of securing firearms. The second sentence of SMC 10.79.020 states that firearms may also be lawfully stored "if carried by or under the control of" a lawfully authorized user. Mr. Alim's expanded allegations demonstrate that he:

- Stores unlocked, accessible firearms in his home when no lawfully authorized user is present (Lindberg Decl. ¶ 3, Ex. 2 ¶ 18);
- Stores unlocked, accessible firearms in his bedroom when he is home, so that they are often not under the control of lawfully authorized users when those users are elsewhere (e.g. the kitchen, downstairs, garage) (*id.* ¶ 19); and
- Stores an unlocked, accessible firearm on a different floor than the one he sleeps, and on the same floor and in closer proximity to one of his minor children (*id.* ¶ 20.

Under any definition of control, Mr. Alim's storage practices do not comply.[2] His current—and

[2] *See supra* Note 1. The facts alleged by Mr. Alim fit well outside the facts in *Patterson*, where the sufficient evidence supported proof beyond a reasonable doubt that a firearm in a closet in a different floor, and with a minor in closer proximity, was not under the control of the defendant. *Patterson*, 79 Mass. App. Ct. at 319–20.

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desired future—storage practices are in direct conflict with the Ordinance, and his request for declaratory judgment is justiciable. Under these alleged circumstances, Mr. Alim additionally does not comply with SMS 10.79.030.

Here, unlike *Forbes* and other cases relied upon by Defendants, Mr. Alim has alleged a desires to continue these storage practices, putting him in direct conflict with the Ordinance. *Forbes v. Pierce Cty.*, 51548-2-II, 2018 WL 4441786, at *5 (Wash. Ct. App. Sept. 18, 2018) (pointing out that plaintiffs did not allege adverse affect and did not allege an intent or desire to engage in the conduct proscribed by the law). These factual allegations are sufficient to state a justiciable claim under State and Federal pleading requirements. *E.g.*, *Acme Finance Co. v. Huse*, 192 Wash. 96, 107, 73 P.2d 341, 345 (1937) (permitting pre-enforcement declaratory judgement claim); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 15-16 (2010) (plaintiff stated a claim by alleging the desire to engage in the prohibited conduct, but for the statute); *Jackson v. City & Cty. of San Francisco*, 829 F. Supp. 2d 867, 871–72 (N.D. Cal. 2011) ("Plaintiffs allege they own guns now, and that based on their personal views of how it would enhance their personal safety, they want to keep their guns unlocked now for potential use in self defense, ...").

Even if Mr. Alim abandoned these practices under threat of enforcement, he has alleged a direct dispute and has standing to pursue declaratory judgment. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393, 108 S. Ct. 636, 643, 98 L. Ed. 2d 782 (1988) (permitting pre-enforcement challenge by plaintiffs who alleged a fear of enforcement—"Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."). And he would be compelled by the City's regulatory action to purchase a gun safe (Lindberg Decl. ¶ 3, Ex. 2 ¶¶ 1, 21), which gives Mr. Alim standing under any test. *See Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (holding that plaintiff had standing based on future economic harm); *Spokane*

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Entrepreneurial Center v. Spokane Moves to Amend Constitution, 185 Wn.2d 97, 106–07, 369 P.3d 140, 145 (2016) (holding that one plaintiff had standing based on future procedural harm—"Regardless of whether these harms might be justified or offset by other societal benefits, these petitioners will suffer harm.").

3. The Proposed FAC States a Justiciable Claim for the Organizational Plaintiffs

The Organizational Plaintiffs also have standing and state a justiciable claim under the proposed FAC. First, the Organizational Plaintiffs may participate in this litigation on behalf of their members. "A non-profi corporation or association which shows that one of more of its members are specifically injured by a government action may represent those members in proceedings for judicial review." *Washington Educ. Ass'n v. Shelton Sch. Dist. No. 309*, 93 Wn.2d 783, 791, 613 P.2d 769, 774 (1980). Mr. Thyng is a member of SAF and the NRA, and Mr. Alim is a member of the NRA. Lindberg Decl. ¶ 3, Ex. 2 ¶¶ 3–4. Both the SAF and NRA have other members who are similarly-situated and who live in the City of Seattle. Because Mr. Alim and Mr. Thyng have shown specific injury, the NRA and SAF may represent them (and other members) in this litigation.

Second, the storage methods proscribed by the Ordinance do not comport with the best practices for safe storage as outlined and recommended by the NRA and SAF. Lindberg Decl. ¶ 3, Ex. 2 ¶ 23. Contrary to Defendants' assertion, for the purpose of the pleadings this allegation is true.[3] The NRA and SAF have an interest in ensuring their members will be free to choose the safe storage model that is best suited to each individual member, rather than abiding by an overly

[3] In any event, Defendants' characterization of the Organizational Plaintiffs' mission and position is mistaken. As their websites point out, safe storage is not satisfied by the requirements put forward by the Ordinance. Indeed, as the NRA website notes, "A person's particular situation will be a major part of the consideration [in safe storage] . . . mechanical locking devices, like the mechanical safeties built into guns, can fail and should not be used as a substitute for safe gun handling." *See* https://gunsafetyrules.nra.org/ (last visited Oct. 19, 2018). There are many safe and secure ways to store firearms that fall outside of the strict limitations required by the Ordinance.

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strict and potentially ineffective method prescribed by statute.

4. Plaintiffs Request Leave to Amend the Complaint

If the Court finds merit in Plaintiffs' request to reconsider denial of leave to amend, Plaintiffs also request that the Court grant Plaintiffs leave to file the proposed FAC and amend the complaint. There will be no prejudice to Defendants if Plaintiffs are permitted to amend. There would be no unfair surprise and amendment will not unduly burden the scheduled proceedings. *See Karlberg v. Otten*, 167 Wn. App. 522, 529, 280 P.3d 1123 (2012). None of the factors outlined in case law (undue prejudice, dilatory practice, undue delay, etc.) are present here, nor could it be where Defendants have not answered, trial is more than six months away, and no discovery has taken place. *See Tagliani v. Colwell*, 10 Wn. App. 227, 234, 517 P.2d 207, 211–12 (1973) (granting leave to amend in the absence of prejudice after a grant of summary judgment).

VI. CONCLUSION

Defendants respectfully submit this Motion for Reconsideration and request that this Court reconsider its order granting Defendants' motion to dismiss and denying leave for Plaintiffs to amend. Plaintiffs further request that the Court grant Plaintiffs leave to submit the proposed First Amended Complaint, and to allow this case to proceed to the merits.

DATED: October 29, 2018.

I certify that this memorandum contains 4034 words, in compliance with the Local Civil Rules.

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s/ Eric A. Lindberg

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

1. I am employed at Corr Cronin LLP, attorneys for Plaintiffs herein.

2. On October 29, 2018, I caused a true and correct copy of the foregoing document to be served on the following parties in the manner indicated below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: October 29, 2018, at Seattle, Washington.

s/ Christy A. Nelson
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